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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-915

ERNEST H. ROBINSON,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL
FROM THE
GEORGIA COURT OF APPEALS

JURISDICTIONAL STATEMENT

Of Counsel:
MICHAEL CLUTTER, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309

ROBERT EUGENE SMITH, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
Attorney for Petitioner

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Georgia Court of Appeals entered July 7, 1977 affirming a judgment of conviction entered against Appellant in the Criminal Court of Fulton County, Georgia. Appellant submits this Jurisdictional

Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 143 Ga. App. 37, 237 S.E.2d 436 (1977). A copy thereof is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on July 7, 1977. An application for rehearing was timely filed and it was denied on July 21, 1977. A copy of said denial is set forth in Appendix B hereto. The Georgia Supreme Court thereafter denied a Petition for Writ of Certiorari on September 8, 1977, and a Petition for Rehearing on September 27, 1977. Copies of said orders are set forth in Appendix C hereto. A Notice of Appeal was filed in the Georgia Court of Appeals on November 3, 1977. A copy of said Notice is set forth in Appendix D hereto.

Appellant challenges the validity of the state statute under which he was convicted, Georgia Criminal Code §26-2101(c), on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States and the decision of the Georgia Court of Appeals is in favor of its validity. Additionally, Appellant challenges the validity of the state statute under which the jury was instructed on scienter, Georgia Criminal Code §26-2101(a), on the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States and the decision of the Georgia Supreme Court is in

favor of its validity. Further, Appellant challenges the Georgia State Constitutional provision, Article VI, Section XVI, authorizing his trial before a five person jury and the decision of the Georgia Court of Appeals is in favor of its validity.

The jurisdiction of the Supreme Court to review the judgment is thus conferred by Title 28, United States Code, Section 1257 (2). The decision of this Court in *Frank v. Maryland*, 359 U.S. 360 (1959) sustains the jurisdiction of this Court to review the judgment of the Georgia Court of Appeals by way of appeal in this case.

QUESTIONS PRESENTED

1. Whether a jury composed of five persons is sufficient to afford an accused in a criminal prosecution the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether there is any rational basis upon which a state may totally prohibit and impose criminal penalties for the dissemination of devices designed or marketed as useful primarily for the stimulation of human genital organs.

3. Whether a state statute which defines scienter in a manner which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution.

4. Whether a warrantless mass seizure of allegedly obscene material may be sustained under the plain view doctrine.

5. Whether the press materials charged against Appellant are not obscene as a matter of law, constituting expression protected under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Article VI, Section XVI of the Georgia Constitution (Georgia Code Annotated §2-5101) and Georgia Criminal Code Section 26-2101 are set forth in Appendix E hereto.

STATEMENT

Appellant was charged in the Criminal Court of Fulton County with an accusation alleging distribution of obscene material in violation of Georgia Criminal Code §26-2101. The charge was predicated upon the sale of two magazines entitled "Cock Hungry" and "Raw Passion" as well as the possession of numerous alleged sexual devices. The devices were seized from Appellant by law enforcement officers without a warrant immediately following the sale of the magazines by him.

Appellant was tried (over his objection) before a five-person jury in the Criminal Court of Fulton County, Georgia. During the trial, the Court allowed into evidence, over Appellant's objection, the devices which law enforcement officers had seized without a warrant. The jury found Appellant guilty and he was thereafter sentenced to one year of imprisonment and a $1,000.00 fine.

The conviction and sentence were affirmed by the Georgia Court of Appeals in the judgment and opinion for which review is sought here. The Georgia Supreme Court thereafter denied a petition for writ of certiorari and the case is now before this Court by way of appeal from the Georgia Court of Appeals.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to the trial herein, Appellant filed a Motion to Dismiss the Accusation insofar as it related to offenses under Georgia Criminal Code §26-2101 (c). The Motion to Dismiss was predicated upon the argument that the section in question (relating to sexual devices) was violative of the United States Constitution on grounds of vagueness, overbreadth and invasions of the rights of due process and privacy. Appellant also filed, prior to trial, a motion to suppress those items that had been taken by law enforcement officers in the warrantless mass seizure of alleged sexual devices. The seizure was alleged to be in violation of Appellant's rights under the Fourth and Fourteenth Amendments to the United States Constitution. Appellant also filed a motion requesting trial before a twelve-person jury, arguing that five-person juries were violative of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. All of Appellant's motions were overruled.

Appellant then went on trial before a five-person jury on January 21, 1976. During the course of the trial Appellant objected to the introduction of the alleged sexual devices for all of the grounds, including the federal constitutional grounds, previously asserted in the motion to dismiss and in the motion to suppress. The objections were overruled.

At the conclusion of the trial, the jury was instructed and said instructions contained the definition of *scienter* which Appellant challenges here. The instructions followed the language of Georgia Criminal Code §26-2101 (a) in telling the jury that the *scienter* requirement does not necessitate actual knowledge of the contents but may be satisfied by a showing of "constructive" knowledge thereof.

Following his conviction, Appellant filed an Amended Motion for New Trial which presented once again to the trial court the federal questions presented herein. The Amended Motion for New Trial was overruled by the Criminal Court of Fulton County without opinion.

Appellant thereafter appealed to the Georgia Court of Appeals, raising therein all of the federal questions presented here. That Court addressed all of the federal questions on the merits and rejected each of them in the judgment and opinion for which review is here sought. The Court affirmed Appellant's conviction and the Georgia Supreme Court thereafter denied a Petition for Writ of Certiorari.

THE QUESTIONS ARE SUBSTANTIAL

I.

A JURY COMPOSED OF FIVE PERSONS IS INSUFFICIENT TO AFFORD AN ACCUSED IN A CRIMINAL PROSECUTION THE RIGHT TO TRIAL BY JURY GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Williams v. Florida* , 399 U.S. 78 (1970), this Court held that the Sixth Amendment guarantee of trial by jury in criminal cases, made applicable to the states through the Fourteenth Amendment, does not require trials before twelve-person panels. While approving six-person juries, the Court in *Williams* left open the question of what minimum number of jurors is required to guarantee the constitutional right to jury trial in state criminal cases. 399 U.S., at 91 n. 28. That is the first question before this Court in the instant case.

The arguments in support of Appellant's position on this question are amply set forth in the Brief of Petitioner in *Ballew v. Georgia*, No. 76-761, *certiorari* granted January 25, 1977, oral argument heard November 1, 1977. Appellant relies on said Brief and oral argument and here submits that the granting of *certiorari* on this issue in *Ballew* amply demonstrates the substantiality of this question.

II.

THERE IS NO RATIONAL BASIS UPON WHICH A STATE MAY TOTALLY PROHIBIT AND IMPOSE CRIMINAL PENALTIES FOR THE DISSEMINATION OF ANY DEVICE DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS.

The state does not contend that the bulk of the material charged against Appellant, the alleged sexual devices, are obscene under Georgia Criminal Code §26-2101 (b) which sets forth the standard three part Miller obscenity test. *Miller v. California*, 413 U.S. 15 (1973). Rather, they are alleged to violate Georgia Criminal Code §26-2101 (c) which provides:

> "Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The seriousness of this question is first demonstrated by the fact that the above definition contains none of the Constitutional limitations upon obscenity set forth by this court in *Miller v. California, supra*. Material may be found obscene under this statute even though it does not meet any of the three tests for obscenity set forth by this Court as Constitutionally necessary in the *Miller* decision. The seriousness of the question here presented is further demonstrated by the fact that the total prohibition of such devices bears no reasonable relationship to any conceivable public interest and has no rational basis.

In *Miller*, the Supreme Court noted that "state statutes designed to regulate obscene material must be carefully limited." 413 U.S. 15, at 23-24. As a result of the need for careful limitation, Supreme Court confined the permissible scope of any state obscenity statute to the regulation of materials which "depict or describe sexual conduct." 413 U.S. 15, at 24. It is clear that, whatever their intended use, the items do not depict sexual conduct.

Further, the Court in *Miller* went on to hold that any state obscenity offense must be limited to those materials which meet a three part test:

> "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, at 24.

The statute in question here sets forth an obscenity offense which is not limited to the category which the Supreme Court found acceptable in *Miller*. It is thus clearly unconstitutional for authorizing the suppression of material as "obscene" even though such material may not appeal to a prurient interest in sex, may not portray sexual conduct in any way, and may possess serious literary, artistic, political or scientific value.

Further, the statute is unconstitutionally vague in its definition of prohibited devices. A novelty item may be marketed or intended as an inducement to humor, but the vendors of such items can only guess as to what is meant by the phrase "intended or marketed primarily for the stimulation of human genital organs." It is clear that in the First Amendment area "government may regulate. . .only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In so regulating, the State must avoid the use of language which is so vague that "men of common intelligence must necessarily guess as to its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Appellant does not contend that a properly instructed jury could not find the items obscene if they were judged under the *Miller* obscenity standards. Appellant concedes that similar devices have been held obscene under the three part *Miller* test in other cases. Appellant objects that the devices in this case were judged not by that constitutionally acceptable three part standard but rather by a standard of obscenity which this Court has never approved.

In addition to falling outside any constitutionally approved standard of obscenity, the statute carries the state into areas where it has no conceivable public interest. In this

regard it is important to note that the statute is not limited to the commercial utilization of sexual devices, rather, it prohibits any sale of any such device to any person. Individuals are thus prohibited from purchasing such items even for their own personal private use on their own bodies in the privacy of their own homes. The state has no possible interest in prohibiting an adult from masturbating in the privacy of his or her home. Likewise, there can be no rational basis for prohibiting the sale of items which such individuals might utilize in so masturbating.

This court has often invalidated legislation because it lacked a reasonable relationship to any public interest. In *Pierce v. Society of Sisters*, 268 U.S. 518 (1925), the court held an Oregon Mandatory public school attendance statute invalid, noting:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S., at 636.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the court overturned a state statute prohibiting the study of the German language, stating:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes a liberty, guaranteed. . . by the Fourteenth Amendment. . . the established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S., at 399-400.

Even assuming, arguendo, that the state has some interest in regulating certain uses to which sexual devices might be put, the statute here in question is overbroad in its total prohibition of such devices. In *Shelton v. Tucker*, 364 U.S. 479 (1960) this court stated in this regard:

> "In a series of decisions, this court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly reserved." 364 U.S., at 488.

In his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Mr. Justice Goldberg reiterated the importance of using the least restrictive alternative when government regulation is in question:

> "In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the state simply on a showing that a regulatory scheme has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy.' *McLaughlin v. Florida*, 379 U.S. 184, 196." 381 U.S., at 497.

This case is similar to that presented in *Griswold, supra,* where this court struck down a statute making any use of contraceptives a criminal offense. In finding that law unconstitutional, the court noted that it impinged upon a protected

right to marital privacy. The prohibition in this case impinges upon the same fundamental right. The statute is not limited to the prohibition of the sale of such devices to minors nor to the prohibition of the commercial use of such devices. It merely sweeps all devices within the definition of obscenity and therefore criminalizes their distribution to anyone, including married couples.

Although this court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that are unduly restrictive of individual freedom. *Dean Milk v. Madison*, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the uses to which sexual devices might be put. Appellant does not concede that the state has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibition of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

III.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter*:

> "[T]he word 'knowing' as used herein shall be deemed to be the actual knowledge or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents if he has the knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."

This instruction is in accord with the terms of Georgia Criminal Code §26-2101 (a) which Appellant challenges. The seriousness of this question is well demonstrated by the fact that certiorari has been granted on this precise issue in *Ballew v. Georgia*, No. 76-761, question number 2, certiorari granted January 25, 1977. Oral argument was heard in *Ballew* on November 1, 1977.

The most recent pronouncement of this Court on the requirements of *scienter* is found in *Hamling v. United States*, 418 U.S. 87 (1974). There, this Court stated:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Consistent with the above statement from *Hamling*, Appellant contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge

of the content, character and nature of the materials with which he was charged. The arguments in support of this position are amply set forth in the Brief of Petitioner in the *Ballew* case and Appellant in this case relies thereon. It is here submitted that the granting of certiorari on this issue in *Ballew* amply demonstrates the substantiality of the question.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES WERE VIOLATED BY THE INTRODUCTION INTO EVIDENCE OF ALLEGEDLY OBSCENE ITEMS SEIZED BY LAW ENFORCEMENT OFFICERS WITHOUT A WARRANT.

The substance of the testimony at a trial was that law enforcement officers purchased two magazines from Appellant and thereafter arrested Appellant and confiscated all the novelty items present. No warrant was obtained to seize the allegedly obscene items nor was any attempt made to secure one. As the officer testified, they were instructed to seize, without a warrant, everything in view which was primarily intended for sexual stimulation.

The officers did not submit the question to a neutral magistrate for a determination of whether the items were obscene under Ga. Code §26-2101 (c). There was no indication that the warrant could not be obtained or that it would be impractical to seek one. The officer testified that the devices were exhibited on shelves within the store and there is no indication that they would have been removed during the time it would take him to view the materials, describe his viewing to

a neutral magistrate, and obtain a warrant. Indeed, the officer testified that Appellant was the only individual working in the store at the time of his arrest, and there was thus no one present to remove the goods had they been left in the store following his arrest. It is thus clear that the officers had ample opportunity to secure a warrant for the seizure of the items both before and after the arrest of the Appellant.

The principles applicable to the warrantless seizure of allegedly obscene material were set forth by United States Supreme Court in *Roaden v. Kentucky*, 413 U.S. 496 (1973). The Court there held that the warrantless seizure of an allegedly obscene film was unconstitutional under the First, Fourth and Fourteenth Amendments. The Court noted that the determination of obscenity must be made by a neutral and detached magistrate rather than a zealous law enforcement officer vigorously pursuing his role in adversary process of controlling crime. The Court thus noted:

> "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.' " 413 U.S. 496, at 506.

The Court thought the issue was controlled by its prior decision in *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968). *Lee Art Theatre* held that the warrant for the seizure of allegedly obscene material may not be issued on the mere conclusory allegations of a police officer. In light of that holding, it is even more clear that an officer may not be allowed to make a seizure of such material with no warrant at all.

> "If, as Marcus and Lee Art Theatre held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a *fortiori*, the officer may not make such a seizure with no warrant at all.' 413 U.S. 496 at 506.

The same conclusion must be reached in this case, and the warrantless mass seizure of all the novelty items as "obscene" must be held unconstitutional. The Georgia Supreme Court, in the *Sewell* case relied upon by the Court of Appeals herein, held that the mass seizure was justified under the "plain view" doctrine in that the items were in plain view. The issue is not whether they were in view, however, but whether a police officer or a magistrate should make the determination of obscenity before any item is seized as obscene. The items in *Roaden, supra*, and in *Lee Art Theatre, supra*, were also in plain view, but this did not serve to sustain their warrantless seizure.

On the basis of the *Lee Art* and *Roaden* decisions alone, Appellant submits that the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is called for before such a decision can be affirmed.

V.

THE MATERIALS CHARGED AGAINST APPELLANT ARE NOT OBSCENE AS A MATTER OF LAW AND SAID MATERIALS CONSTITUTE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the magazines "Cock Hungry" and "Raw Passion". The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). It was later expounded upon in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

The continuing validity of the Jacobellis doctrine and of the appellate duty it imposes was affirmed here recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the magazines here. An item of similar explicitness was before this Court in *Jenkins v. Georgia, supra*. In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Court there noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards." 418 U.S. 153, 161.

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is

clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one [may be constitutionally prosecuted] for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core'* sexual conduct." 418 U.S. 153, at 160 quoting 413 U.S. 1, at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal of *hard core* sexual conduct." 418 U.S. 153, at 161.

The magazines here are simply not hard core sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that the book constitutes protected speech under the First and Fourteenth Amendments of the United States Constitution.

In light of this Court's pronouncement that no one may be constitutionally prosecuted in this area except for the sale of "materials which depict or describe patently offensive 'hard core' sexual conduct," 418 U.S., at 153, the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is required before Appellant's conviction may be affirmed.

CONCLUSION

The questions submitted herein are so substantial as to require plenary review. With respect to Questions I and III, the substantiality is demonstrated by the grant of *certiorari* on identical questions in *Ballew v. Georgia, supra.* With respect to Question Number II, the substantiality is demonstrated by the fact that, since Appellant's conviction, numerous other individuals have been prosecuted and convicted for the sale of devices designed for sexual stimulation. If the statute is unconstitutional as Appellant contends, the importance of such a determination will extend to numerous other cases. The Court is thus respectfully requested to note probable jurisdiction and set the case for briefing and oral argument.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890
Counsel to Appellant

Of Counsel:

MICHAEL CLUTTER, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

APPENDIX A

Ernest H. ROBINSON

v.

The STATE.

No. 54054.

Court of Appeals of Georgia, Division No. 3.

July 7, 1977.

Rehearing Denied July 21, 1977.

Defendant was convicted in the State Court, Fulton County, Daniel Duke, J., of illegal sale of pornographic paraphernalia, and he appealed. The Court of Appeals, Marshall, J., held that: (1) statute defining offense was not violative of constitutional norms because of vagueness, overbreadth, and imperfect standards and definitions; (2) jury could lawfully return a finding of guilty of distributing obscene material upon being convinced beyond reasonable doubt that any one of seized items was obscene; (3) separate findings as to each item were not required; (4) same standards of obscenity applied to both magazines and stimulative devices inasmuch as items were a part of generic term "obscene material" proscribed by statute; (5) five-man jury was not constitutionally inadequate; (6) devices did not require a separate adjudication as to obscenity to avoid prior restraint since they came within definition of statute and, hence, were obscene as a matter of law; (7) seizure of materials that were openly displayed in plain view for everyone who entered to see came within plain view doctrine, and (8) voluntary closure of store by owner after arrest of clerk did not constitute a state initiated or state enforced restraint as a matter of law of right to continue to conduct a lawful business.

Affirmed.

Deen, P. J., concurred specially and filed opinion.

1. Criminal Law ⇐13.1(13)
Obscenity ⇐2

Statutory proscription against sale of pornographic paraphernalia is not violative of constitutional norms because of vagueness, overbreadth, and imperfect standards and definitions. Code, § 26-2101(c).

2. Indictment and Information ⇐125(1)

It is permissible to embrace in a single count multiple commissions of the same crime if of the same type.

3. Indictment and Information ⇐125(4)

A single count embracing multiple commissions of the same crime if of the same type, does not charge separate offenses but includes only one offense. Code, § 26-2101(c).

4. Obscenity ⇐17

Jury could lawfully return a finding of guilty of distributing obscene material upon being convinced beyond a reasonable doubt that any one of the seized items was obscene. Code, § 26-2101(c).

5. Obscenity ⇐18

Separate findings as to each item alleged to be obscene were not required where a finding as to any one was sufficient to support verdict and sentence. Code, § 26-2101(c).

6. Obscenity ⇐5

Same standards of obscenity applied to both magazines and stimulative devices seized at time of arrest inasmuch as items were a part of generic term "obscene material" proscribed by statute. Code, § 26-2101(c).

7. Constitutional Law ⇐267

A five-man jury is constitutionally adequate for all courts except superior courts and is not violative of due process.

8. Obscenity ⇐5
Searches and Seizures ⇐3.3(4)

Seizure of allegedly obscene material that was openly displayed in plain view for everyone who entered to see came within plain view doctrine and, hence, was valid even though there was no warrant nor a prior judicial determination as to obscenity. Code, § 26-2101(c).

9. Obscenity ⇐5

Stimulative devices do not require a separate adjudication as to obscenity to avoid prior restraint since, if they come within definition of statute, they are obscene as a matter of law. Code, § 26-2101(c).

10. Obscenity ⇐5
Searches and Seizures ⇐3.3(1)

Allegedly obscene magazines that were sold or offered for sale became evidence of a violation of law committed in presence of police officer and were subject to seizure without warrant or prior judicial determination of obscenity. Code, § 26-2101(c).

11. Constitutional Law ⇐88

Voluntary closing of bookstore by owner after arrest of clerk for illegal sale of pornographic paraphernalia did not amount to a state initiated or a state enforced restraint as a matter of law of right to continue to conduct a lawful business. Code, § 26-2101(c).

12. Obscenity ⇐5

Materials that come within definition of statute defining pornographic paraphernalia are obscene as a matter of law. Code, § 26-2101(c).

Nadler, Gold & Beskin, Gary M. Nadler, Donald C. Beskin, Atlanta, for appellant.

Hinson McAuliffe, Sol., Leonard W. Rhodes, Asst. Sol., Atlanta, for appellee.

MARSHALL, Judge.

Appellant appeals his conviction for a violation of the illegal sale of pornographic paraphernalia, a misdemeanor, and his sentence to confinement for 12 months. He does not raise any issue as to the sufficiency of the evidence, but restricts his enumerations of error to the denial of numerous pretrial motions, and a related charge of the court. The evidence shows that Robinson was an employee in an "adult book store" in the City of Atlanta. A police officer on the pornographic-enforcement squad entered the store, perused magazines displayed on the stands and marked with a selling price, picked one out, and attempted to purchase the magazine. Robinson recognized the officer, and refused to sell the magazine for the stated reason that to do so would subject him to arrest. The officer left the store, and a back-up officer, not known to Robinson, entered the store and picked up another magazine and started to purchase it. At that moment, the first officer reentered the store, and Robinson refused to complete the sale to the second officer. The officers observed numerous artificial devices apparently designed to stimulate human sexual organs, such as rubber penis, penis extensions, a penetratable, life-sized rubber doll and penetratable objects in the shape of a female vagina. These items were in plain view, priced, and apparently available for sale. The rubber stimulators and two magazines were confiscated, and Robinson was placed under arrest. Inasmuch as Robinson was the sole clerk in the store, and pursuant to the previous instructions of the owners or operators of the store, the store was closed and locked upon Robinson's arrest. The appellant asserts as enumerations of error that there was an illegal search and seizure; that the locking of the store was a prior restraint without a hearing; that the combining in one count of the sale or possesion with intent to sell of magazines with the items for erotic stimulation, was duplicitous and that the statute involved was violative of constitutional norms because of vagueness, overbreadth, and imperfect standards and definitions; that trial by a jury of five

violated due process; as well as error in certain charges of the trial court. *Held*:

1. Because of the constitutional questions raised this case was transferred to the Supreme Court. That court, upon concluding that all constitutional questions raised had previously been passed upon in earlier controversies, returned the case to this court for consideration.

[1] 2. The first and fourth enumerations complain that Code Ann. § 26-2101(c) (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344; 1975, p. 498) violates constitutional norms. Georgia's obscenity statute has previously withstood the same attacks made here. The 1975 amendment to this section simply defined in more definite terms what had been previously referred to as "material," and made no substantive change so as to require a new determination as to the constitutional issues sought to be raised. There is no merit in these two enumerations. *Sewell v. State*, 238 Ga. 495(1), 233 S.E.2d 187 (1977).

[2-6] 3. Enumerations 2, 6, 7, and 8 assert that the trial judge erred in allowing the jury to consider as one offense the sale of or the possession with intent to sell the two magazines, together with the stimulative devices; in refusing to require the jury to make a separate finding as to obscenity as to each item; in giving a charge defining two offenses, yet requiring the jury to return a single verdict; and in requiring the jury to apply to the stimulative devices the standards of obscenity relative to the magazines. As all of these enumerations are related, they are subject to the same general answer. As stated by the Supreme Court in *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187, supra, the addition of subsection (c) to Code Ann. § 26-2101 did not create a new crime. The 1975 amendment simply defined in more concrete terms what had been referred to previously as "material," and made no substantive change in the law against distributing obscene materials. It is permissible to embrace in a single count multiple commissions of the same crime, if of the same type. Such a count does not charge separate offenses, but includes only one offense. *Westfall v. State*, 4 Ga.App. 834, 838(1), 62 S.E. 558 (1908); *Young v. State*, 4 Ga.App. 827(4), 62 S.E. 558 (1908). See *Cragg v. State*, 224 Ga. 196, 160 S.E.2d 817 (1968); *Milhollan v. State*, 221 Ga. 165, 166(2), 143 S.E.2d 730 (1965). In this case, the appellant was charged with selling or possessing with intent to sell 59 separate, obscene items. The trial court meticulously defined obscenity, the matter of intent, and the other pertinent elements of distributing obscene material. The statute provides that it is a violation to sell "any" obscene materials or to possess the same with the intent to sell. In this case, the jury could lawfully return a finding of guilty of distributing obscene material upon being convinced beyond reasonable doubt that any one of the 59 items was obscene. The jury had the benefit of its own visual observation of the evidence, the testimony of a defense expert, and its own knowledge of contemporary community standards as defined and limited by the charge of the court. We cannot say that the jury's finding that any one or all of the items were obscene, is unsupported by the evidence nor that they were required to make separate findings as to each items where a finding as to any one is sufficient to support the verdict and sentence. See *Lowe v. State*, 57 Ga. 171(2) (1876). For the same reasons, it was not error for the trial judge to charge the jury the same standards of obscenity applied to both the magazines and the stimulative devices, inasmuch as stimulative devices and magazines are a part of the generic term "obscene material."

[7] 4. In his third enumeration of error, the appellant maintains that a five-man jury violates the concepts of due process. Contrary to his position, the Supreme Court of our state has held that, absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, a five-man jury is constitutionally adequate as prescribed by the 1945 Constitution of Georgia for all courts except superior courts. *Sanders v. State*, 234 Ga. 586, 587, 216 S.E.2d 838 (1975); *Ballew v. State*, 138 Ga.App. 530, 535(6), 227 S.E.2d 65 (1976). This enumeration is without merit.

BEST COPY AVAILABLE

[8-12] 5. To the fifth enumeration of error, Robinson argues that the trial judge erred in overruling his motion to suppress the evidence of the seizure of the magazines and devices. The basis of this enumeration is that there had been no warrant nor judicial determination as to obscenity, and thus that the forced closing of the book store amounted to a prior restraint of future sales of valid as well as invalid merchandise. The arresting officer testified that he was familiar with the displayed merchandise, and that all the material confiscated clearly violated the statute. It was openly displayed in plain view for everyone who entered to see. The seizure here comes within the plain-view doctrine, as held in *State v. Swift*, 232 Ga. 535(2), 207 S.E.2d 459 (1974), acknowledging the validity of the holding in *Brisendine v. State*, 130 Ga. App. 249(1), 203 S.E.2d 308 (1973). Devices such as those involved here do not require a separate adjudication to avoid prior restraint, as required in cases of films or printed material. If they come within the definition in the statute, they are obscene as a matter of law. *Sewell v. State*, 238 Ga. 495, p. 496, supra, 233 S.E.2d 187. The two magazines were sold or offered for sale, and thus became evidence of a violation of law committed in the presence of the officer. As to the closing of the store, this was not a padlocking by the state. The owner or operator of the store voluntarily elected to close the store. Thus, there was no state-initiated or state-enforced restraint as a matter of law of the right to continue to conduct a lawful business. This enumeration likewise is without merit.

Judgment affirmed.

WEBB, J., concurs.

DEEN, P. J., concurs specially.

DEEN, Presiding Judge, concurring specially.

The record reflects that the defense expert referred to in Division Three was a sex expert in pornotherapy, a member of The American Association of Sex Counselors, certified by the State of Georgia Vocational Rehabilitation and the Department of Children and Family Services, a licensed clinical psychotherapist on the staff of a psychiatric hospital, a lecturer at Emory University, has worked with the Atlanta Public School System and has done juvenile counseling. He testified: "Although I have worked with some unusual cases of children, five year olds—excessive masturbation, those kind of things," it appears that most of his work in the sexuality problem area was with adults "having trouble relating to each other." He testified generally that the two magazines under consideration, "Raw Passion" and "Cock Hungry," the rubber penis extensions, plastic vaginas, battery run vibrators, "french ticklers", explicit magazine photograph closeups of group sex in differing positions were educational, beneficial and contain scientific value for the average woman and man. He felt that the average person would not view this material exclusively or primarily with prurient interest, and that the two magazines and materials do have scientific value. He further stated that there is a strong opinion that repressed sexuality can lead to violent outpourings "going on to violent crime" if this type material and magazines were not available for use. The reverse of this was discussed, but this latter argument was not considered in the majority view or minority view of "The President's Commission on Obscenity and Pornography" wherein the Congress of the United States had expressed "the traffic in obscenity and pornography is a matter of national concern."

The jury, a cross section of average citizens, could have rejected and chose to disbelieve the testimony of the expert witness as to close up photographs of group sex containing scientific value for the average woman or man and may have chosen to "use their own common sense as intelligent human beings . . . ." *Felkschneider v. State*, 127 Ga.App. 745, 746, 195 S.E.2d 184, 185, or they may have decided the "right of privacy" to control their own body politic of community standards superseded the First Amendment rights of defendant, particularly since obscenity is not protected by First Amendment freedoms. Compare *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201.

APPENDIX B

Court of Appeals of the State of Georgia

Atlanta, July 21, 1977

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

54054 Ernest H. Robinson v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Morgan Thomas
Clerk

APPENDIX C

Clerk's Office, Supreme Court of Georgia

Dear Sir: Atlanta, September 8, 1977

Case No. 32834, Robinson v. State.

The Supreme Court today denied the writ of certiorari in this case.

Marshall, J., disqualified.

Very truly yours,

Mrs. Joline B. Williams
Clerk

Clerk's Office, Supreme Court of Georgia

Dear Sir: Atlanta, September 27, 1977

The motion for a reconsideration was denied today:

Case No. 32834, *Robinson v. State.*

Marshall, J., disqualified.

Yours very truly,

Mrs. Joline B. Williams,
Clerk

APPENDIX D

FILED IN OFFICE
November 3, 1977
/s/ Morgan Thomas
Clerk, Court of Appeals of Georgia

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

Case No. 53417

ERNEST ROBINSON,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ERNEST ROBINSON, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Order of the Georgia Court of Appeals affirming the judgment of conviction entered against Appellant herein. A Petition for Rehearing was denied by the Georgia Court of Appeals on July 21, 1977. The Georgia Supreme Court thereafter denied a Petition for Writ of Certiorari on September 19, 1977 and a Petition for Rehearing on September 27, 1977, *Robinson v. State*, No. 32834.

This appeal is taken pursuant to the authorization of 28 U.S.C. §1257 (2).

/s/ ROBERT EUGENE SMITH, Esq.
MICHAEL CLUTTER, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Counsel to Appellant

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law. . .abridging the freedom of speech, or of the press. . ."

2. The pertinent provisions of the Fourth Amendment are:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . ."

4. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Article VI, Section XVI of the Georgia Constitution (Georgia Code Annotated §2-5101) provides:

"The right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

6. Georgia Criminal Code §26-2101, Acts of 1975, p. 498, provides as follows:

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing,"

as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts of involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

(Acts 1968, pp 1249, 1302; 1971, p. 344; 1975, p. 498.

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 77-915

ERNEST H. ROBINSON,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE WITH SUPPORTING BRIEF

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

LEONARD W. RHODES
Assistant Solicitor General

ANDREW J. HAIRSTON
Assistant Solicitor General

Attorneys for Appellee

53 State Court Building
160 Pryor Street, S.W.
Atlanta, Georgia 30303
(404) 572-2911

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IN THE

Supreme Court of the United States

NO. 77-915

ERNEST H. ROBINSON,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE

Appellee, State of Georgia, moves to dismiss pursuant to Rule 16(1)(b) on the grounds that:

(1) The appeal does not present a substantial federal question;

(2) The judgment rests on an adequate non-federal basis;

(3) The Court of Appeals of Georgia had and followed the precedents set by this Court which adequately covered all questions raised on appeal;

(4) The Appellant did not in the trial court demand or request that he be tried by a jury of more than five persons; and

(5) The Appellant did not raise in the Court of Appeals of Georgia the question of Obscenity vel non of the magazines *Cock Hungry* and *Raw Passion.*

In the alternative, appellee moves to affirm the judgment of the Court of Appeals of Georgia, pursuant to Rule 16(1)(c) on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, appellee further moves to dismiss or affirm pursuant to Rule 16(1)(d) on the grounds that the sale of the magazines *Cock Hungry* and *Raw Passion* by the appellant was and is sufficient to support his single-count conviction, and the question of whether these magazines were constitutionally protected was not raised nor passed upon by the appellate courts of Georgia, and this question was therefore waived by the appellant.

ARGUMENT

I.

A. APPELLANT DID NOT DEMAND A TRIAL BY JURY COMPOSED OF MORE THAN FIVE PERSONS.

Appellant asserts on page 5 of his Jurisdictional Statement that he ". . . filed a motion requesting trial before a twelve-person jury, arguing that five-person juries were violative of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. . . ." This assertion is not supported by the record in this case.

Appellant filed a motion (consolidated with other

unrelated cases and defendants) denominated by him a "Second Motion To Dismiss Or In The Alternative Demur" (R-10), in which he demanded that the accusation against him be dismissed because a five-person jury violated the Sixth and Fourteenth Amendments. He further asserted in said motion that ". . . the lowest number of jurors allowed in a criminal trial is six. . . ."

At no time did the appellant demand to be tried by a jury composed of more than five persons, he merely sought to have the charges against him dismissed rather than demanding that a jury composed of six or twelve persons be empaneled to try the case.

A copy of the appellant's motion appearing on page 10 of the record is set forth as Appendix A hereto.

B. A JURY OF FIVE PERSONS IS CONSTITUTIONALLY ADEQUATE FOR THE TRIAL OF MISDEMEANOR CASES WHERE THE MAXIMUM POSSIBLE IMPRISONMENT IS TWELVE MONTHS.

Appellant was tried in the Criminal Court of Fulton County[1] by a jury of five persons[2] selected from a panel of twelve prospective jurors qualified to serve, with the appellant having four peremptory challenges, the State having three peremptory challenges, and with the appellant having benefit of the first and last challenge.

---

[1] The name of the Criminal Court of Fulton County has been changed, effective January 2, 1977, by the merger of the Criminal Court of Fulton County with the Civil Court of Fulton County into a court known as and named the State Court of Fulton County. Georgia Laws 1976 Session, p. 3023.

[2] Effective March 24, 1976, the number of jurors was changed from five to six in the criminal Court of Fulton County. Georgia Laws 1976 Session, p. 3019.

It was necessary that each individual juror believe, beyond a reasonable doubt, that Appellant was guilty of the offenses with which he was charged and that all the elements of the crimes were present, including the fact of obscenity. Jury verdicts in Georgia must be unanimous, *Ball v. The State of Georgia*, 9 Ga. App. 162, 20 S.E. 888 (1911), and the jury in this case was so charged (T-138).

The five-man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six-man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric Judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156; 88 S. Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the

> jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.*
>
> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

It is clear from *Williams* that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One inportant factor is the insulation provided by a law body standing between the government and the defendant. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Appellant has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Appellant argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams:*

> ". . . the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),

"Because the members of the five-man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." *THE FIVE-MAN CIVIL JURY*, 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimum number of jurors may be; however, in *Williams* the Court stated in a footnote that six is above the minimum:

"We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' *but we do not doubt that six is above that minimum*" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

If six is above the minimum, it follows that five cannot be below the minimum. There is no number in between.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court considered the jury system of Louisiana and wrote:

"Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes, a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12

were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).

. . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

The Court again in *Colgrove v. Battin*, 413 U.S. 149 (1973) was faced with making a decision on the question of the number of jurors required, this time the question arose under the Seventh Amendment and concerned civil juries. The Court in following *Williams v. Florida*, supra, stated:

". . . Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, 399 U.S., at 100, 90 S. Ct., at 1905, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498, 51 S. Ct. 513, 514, 75 L. Ed. 1188 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that 'the reliability of the jury as a factfinder . . . [is] a function of its size,' 399 U.S., at 100-101, 90 S. Ct., at 1906, and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of

trial by a jury." 413 U.S. 149, 157; 93 S. Ct. 2448, 2453 (1973).

It is clear that the Constitution does not require any specific number of persons to make up a trial jury; and had the framers of the Constitution, and the Amendments thereto, intended that trial juries be composed of not less than twelve persons, or any other number, the minimum number could easily have been written into the Constitution. This was not done, and therefore, it can be assumed that it was intended that the number required be flexible and left to Congress and the legislatures of the various states to make that determination.

In *Williams v. Florida*, supra, a six-person jury was held to be constitutionally adequate in a case involving the felony offense of robbery where a life sentence was imposed. In this case, the appellant was tried by a five-person jury for a misdemeanor offense where the maximum imprisonment could be no more than twelve months.

While it is clear that a criminal defendant is entitled to a jury trial except for petty offenses, *Baldwin v. New York*, 399 U.S. 66 (1970), there is no constitutional requirement that the question of obscenity be determined by more than one person in a civil proceeding, a judge without the intervention of a jury is competent to perform this function. *Alexander v. Virginia*, 413 U.S. 836, 93 S. Ct. 2803 (1973).

On a criminal trial for distributing obscene materials, it is clear that the number of jurors is constitutionally irrelevant as long as the number is sufficient to carry out the jury's historical function and five jurors are adequate for that purpose.

II.

SECTION 26-2101(c) OF THE CRIMINAL CODE OF GEORGIA DOES NOT TOTALLY PROHIBIT THE DISSEMINATION OF DEVICES DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS, NOR IS THE STATUTE UNCONSTITUTIONAL FOR ANY REASON ASSERTED BY THE APPELLANT.

The statute under which appellant was charged, tried, and convicted is Section 26-2101 of the Criminal Code of Georgia, Georgia Laws 1968, pages 1249, 1302, as amended by Georgia Laws 1971, page 344, and further amended by Georgia Laws 1975, page 498.

To fall within paragraph (c) of Section 26-2101 of the Criminal Code of Georgia, any person charged with an offense thereunder must, *knowing the obscene nature of the devices*, sell, lend, rent, lease, give, advertise, publish, exhibit, or otherwise disseminate the device or devices to another person, or possess them with intent to do so. The statute is therefore aimed at a particular segment of society, i.e., those who distribute material of a sexual nature, those who purvey filth for monetary gain. These persons must be assumed to possess specialized knowledge of the use and purpose of the things they sell. The statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices employed by persons who distribute such merchandise. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *U.S. v. Petrillo*, 332 U.S. 1, 7-8; and *Boyce Motor Lines, Inc. v. U. S.*, 342 U.S. 337, 340. The section in question is not void for vagueness in that men of common under-

standing must not necessarily guess at its meaning. Persons have fair warning of the prohibited conduct. *Bouie v. City of Columbia*, 378 U.S. 347. Additionally, sections of the code which relate to the same subject matter must be construed together. Section 26-2021 of the Criminal Code of Georgia (Georgia Laws 1975, page 402) makes the instrumental manipulation of another's genital organs for money a crime. When the two sections are read together, 26-2101(c) and 26-2021, the law is made clear that the distribution of instruments commonly and primarily used to masturbate or erotically stimulate the genital organs is prohibited conduct.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C.A. 1462 and thereby obscene. *U.S. v. Gentile*, 211 F. Supp. 383 (D.C. Maryland 1962). The language in 18 U.S.C.A. 1462 has been held to be constitutional. *U.S. v. Orito*, 413 U.S. 139 (1973); *U.S. v. Reidel*, 402 U.S. 354; *U.S. v. 37 Photographs*, 402 U.S. 376; *Manual Enterprises v. Day*, 370 U.S. 478. A state court has applied the obscenity statute to artificial penises. *People v. Clark*, 304 N.Y.S. 2d 326 (1969).

The statute in question here does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in *Stanley v. Georgia*, 394 U.S. 557. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49; and *U.S. v. Orito*, 413 U.S. 139.

Appellant contends that the standards or guide lines set forth in *Miller v. California*, 413 U.S. 15; 93 S. Ct. 2607 (1973), used in determining obscenity in press materials, applies to the devices described and prohibited by Criminal Code Section 26-2101(c). We disagree. The Miller guide lines were set up by this court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of the press. The devices prohibited by Code Section 26-2101 are neither speech nor press materials and are therefore not protected by the First Amendment.

The appellant compares the Georgia obscenity statute with that dealt with by the Supreme Court of the United States in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965); 85 S.Ct. 1678. The court there dealt with statutes prohibiting the use of contraceptives.

The Georgia statute does not prohibit the use of the devices described in Code Section 26-2101(c) by married couples or anyone else. As a matter of fact and law, the statute provides exceptions whereby persons can avail themselves of such devices, Code Section 26-2101(e). The procedure required in the exception is the same as that required for dispensing most drugs, including those used for birth control.

The court in *Griswold*, supra, recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." 381 U.S. 479, 485; 85 S. Ct. 1678, 1682 (9, 10).

The court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), again recognized a distinction between the rights of a theater and the rights of privacy of its customers. The court there recognized legitimate state interests in stemming the tide of commercialized obscenity, the interests of the public in the quality of life and the total community environment, the tone of

commerce in great city centers, and possibly, the public safety itself. The court there mentioned the arguable correlation between obscene material and crime in holding that state interests are involved.

There are numerous statements and restatements in *Paris Adult Theatre I v. Slaton*, supra, reiterating the rights of the several states to legislate in matters dealt with by the Georgia Legislature in Code Section 26-2101. Some of those excerpts are:

> ". . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the federal securities and antitrust laws and a host of federal regulations. . . . Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography." 413 U.S. 49, 61; 93 S. Ct. 2628, 2637 (11).

> ". . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. . . . It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice—those in politics, religion, and expression of ideas—are explicitly protected. Totally unlimited play for free will, however, is not allowed in our or any other society. . . ." 413 U.S. 49, 63; 93 S. Ct. 2628, 2638.

> ". . . Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S., at 568, 89 S. Ct., at 1249, and the marital bedroom of *Griswold v. Connecticut*, supra, 381 U.S., at 485-486; 85 S. Ct., at 1682-1683. . . ." 413 U.S. 49, 65; 93 S.C. 2628, 2639 (13, 14).

> ". . . We have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." 413 U.S. 49, 66; 93 S. Ct. 2628, 2640 (17-21).

The State of Georgia has a legitimate interest in the subject matter of Code Section 26-2101(c) and the same is not unconstitutional for any reason asserted by the appellant.

III.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that

the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents*.

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the

court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the appellant herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, ____ U.S. ____, 97 S. Ct. 2938, this court recently denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Appellant concedes that proof of scienter may be made by circumstantial evidence. Appellee contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstancial evidence.

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross

the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the appellant had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant viewed the film is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE DEVICES SEIZED BY THE OFFICERS AT THE TIME APPELLANT WAS ARRESTED.

On August 6, 1975, officers proceeded to the Roswell Road Adult Book Store located in the City of Atlanta, Fulton County, Georgia, where they purchased from the appellant two magazines, *Cock Hungry* and *Raw Passion*, and determined that in plain view, on display for sale in the store were numerous sexual devices proscribed by Section 26-2101(c) of the Criminal Code of Georgia. The officers testimony left no doubt that this was a public place, replete with books and magazines,

mini-movies, and peep shows which depicted and described explicit sexual acts.

The sexual devices on public display for sale, in open and plain view of everyone who entered the store, were seized by the officers. Nothing else was seized.

The appellant contends that the devices seized are protected by the First Amendment to the Constitution and cites *Roaden v. Kentucky*, 413 U.S. 496 (1973) and *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1969) as cases controlling in the seizure of such devices. Needless to say, we disagree. Both the cases cited are cases dealing with the seizure of motion picture films from commercial theaters. We would agree that motion picture films, books, and magazines would not be subject to seizure under the same set of facts and circumstances as those in this case in which the devices were seized.

There is a vast difference in devices designed and/or marketed as useful primarily for the stimulation of human genital organs on the one hand, and motion picture films, books, and magazines on the other; and on the one hand, to seize films, books, and magazines without a prior judicial determination would be a prior restraint of material protected by the First Amendment of the United States Constitution under the present decisions of our appellate courts, while on the other hand, the dissemination of material described in Code Section 26-2101(c), prohibited by Code Section 26-2101(a), would not be, and was not in this case, a prior restraint of material protected by the First Amendment.

The Supreme Court of the United States in *Roaden v. Kentucky*, supra, recognized and made a distinction in making a determination as to reasonableness of the seizure, 413 U.S. 496, 501; 93 S. Ct. 2796, 2800 (1, 2).

The devices seized, not afforded protection under the First Amendment of the Constitution, are declared to be contraband under the provisions of Code Section 26-2104, 'and therefore subject to seizure under the same rules as other contraband such as illegal drugs, stolen merchandise, and other fruits of crime.

What a person knowingly exposes to the public, even in his own house or office, is not subject to Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 351; 88 S. Ct. 507, 511 (1967).

Contraband items in plain view of police officers, in a place where the officers have a right and are authorized to be, are subject to and may be seized without a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443; 91 S. Ct. 2022 (1971); *Harris v. United States*, 390 U.S. 234, 236; 88 S. Ct. 992, 993 (1968).

The devices seized were in plain view of the officers while the officers were in a lawful position to view the items seized, and for that and the foregoing reasons asserted, no warrant was necessary to make a lawful seizure.

V.

THE QUESTION OF OBSCENITY VEL NON WAS NOT RAISED BY APPELLANT IN THE COURT OF APPEALS OF GEORGIA NOR WAS IT PASSED UPON.

The appellant failed to challenge in the Court of Appeals of Georgia the sufficiency of the evidence to sustain the finding by the trial jury that the materials were obscene. See the opinion in this case by the Court of Appeals of Georgia, page A.1 of appendix to appellant's Jurisdictional Statement, where the Court wrote:

> "Appellant appeals his conviction for a violation of the illegal sale of pornographic paraphernalia, a misdemeanor, and his sentence to confinement for 12 months. *He does not raise any issue as to the sufficiency of the evidence, but restricts his enumerations of error to the denial of numerous pretrial motions, and a related charge of the Court.*" (Emphasis added)

The Supreme Court of Georgia in *Dyke v. The State*, 232 Ga. 817, 821, and the Court of Appeals in *Ballew v. The State*, 138 Ga. App. 530, recognize that they are not bound to approve the jury's finding and that an independent review must be made to determine the constitutional fact of obscenity when the question is invoked on appeal. In this case, the appellant chose not to invoke appellate review in the Court of Appeals of Georgia on the question of obscenity vel non, and by making that choice he has waived appellate review of the question. Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *It is only in exceptional cases carried to it from the federal courts that questions not pressed or passed upon below are reviewed. Youakim v. Miller*, ____ U.S. ____, 96 S. Ct. 1399 (1976). (Emphasis added)

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed; or in the alternative, the judgment of the Court of Appeals of Georgia should be affirmed.

Respectfully submitted,

LEONARD W. RHODES
Assistant Solicitor General

ANDREW J. HAIRSTON
Assistant Solicitor General
Attorneys for Appellee

53 State Court Building
160 Pryor Street, S.W.
Atlanta, Georgia 30303
(404) 572-2911

CERTIFICATE OF SERVICE

I have this day caused to be mailed three copies of the within motion, first class postage prepaid, to Robert Eugene Smith, Esq., 1409 Peachtree Street, N.E., Atlanta, Georgia 30309.

This day of January, 1978.

LEONARD W. RHODES
Counsel for Appellee

APPENDIX A

IN THE CRIMINAL COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE OF GEORGIA, *Plaintiff*,	
–vs–	
EARNEST ROBINSON;	CASE NO. 156435
EARNEST ROBINSON;	CASE NO. 147263
JOHN PEAVY;	CASE NO. 156440
DAVID BURNETTE;	CASE NO. 156432
ELIZABETH GREEN; and	CASE NO. 156433
JAMES SHAW,	CASE NO. 156431
Defendants.	

SECOND MOTION TO DISMISS OR IN THE ALTERNATIVE DEMUR

Defendants move the Court to dismiss the above cases on the grounds that a five-person jury is used to determine innocence or guilt, and under the Sixth and Fourteenth Amendments of the United States Constitution this is constitutionally invalid since the lowest number of jurors allowed in a criminal trial is six. Further, Art. VI, Sec. XVI, para. I, of the State Constitution (Code 2-5105) and Georgia L. 1890-1891, Vol. 2, p. 935, Georgia L. 1935, 498, are unconstitutional on their face and as applied, as said laws permit a five-person jury and therefore deny the Defendants a six-person jury trial under the Sixth and Fourteenth Amendments.

WHEREFORE, Defendants pray that their Second Motion to Dismiss be sustained.

GLENN ZELL
Attorney for Defendants

Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303
(404) 524-6878

William v. Florida, 399 U.S. 78, 136
Baldwin v. New York, 399 U.S. 60